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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-567

UNITED STATES OF AMERICA,

Petitioner,

vs.

EUGENE DIFRANCESCO,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

Interest of Amicus Curiae and Consent.

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, specifically their right to be free from government appeals of sentences in violation of the Double Jeopardy Clause. Accordingly, the State Public Defender of California is filing this brief *amicus curiae* in support of the respondent herein.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by Wade H. McCree, Jr., So-

licitor General, and Patrick J. Baker, Esq., counsel for petitioner and respondent, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

ARGUMENT.

THE DOUBLE JEOPARDY CLAUSE BARS GOVERNMENT APPEALS OF SENTENCES.

INTRODUCTION.

In its opinion of August 6, 1979, reported at 604 F.2d 769, the Court of Appeals for the Second Circuit held that the statutory provision authorizing a government appeal of the trial court's sentence of a defendant who is a "dangerous special offender" (18 U.S.C. §3576) violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The State Public Defender of California argues as *Amicus Curiae* that this ruling correctly resolves the constitutional issue and should be affirmed. *Amicus* agrees with the Second Circuit's analysis that a defendant is placed twice "in jeopardy of life or limb" when the prosecution is given a "second crack" at obtaining a harsher sentence by appealing to another tribunal in hopes it will be more sympathetic to its arguments for severity.

The Government, of course, takes the position that the Double Jeopardy Clause does not bar appeals of sentences at the instigation of the government. The first problem with accepting this interpretation is that it would thwart fundamental policies underlying the Double Jeopardy Clause. Permitting the government to instigate an appellate drive to increase the degree of punishment would invariably subject the defendant to the mental anguish of increased uncertainty as to the length of his sentence as he begins to serve it. It also subjects him to the ordeal and added expense of defending his sentence on appeal having already marshalled his resources in the trial court to obtain a disposition which was favorable, at least in relative terms.

In addition to these psychological and financial tolls, a government appeal of the sentence would also defeat the

criminal defendant's "valued right to have his trial completed by a particular tribunal." (*Swisher v. Brady*, 438 U.S. 204, 215 (1978).) Such an appeal threatens to substitute the appellate tribunal's remoteness for the trial judge's familiarity with the case and his proximity to the trial and sentencing issues. It places the defendant in the unfair position of attempting to devise a sentencing strategy directed at an unknown tribunal that has not presided over the case, has had no opportunity to make a subjective evaluation of the defendant's character, and has not heard and observed the demeanor of witnesses relevant to the sentencing decision. It leaves the defendant, in short, at the mercy of a tribunal that does not know him or his case except through a cold and throughly inadequate appellate transcript.

A second problem with accepting the Government's interpretation of the Double Jeopardy Clause is that the goal it seeks to achieve through government appeals of sentences, greater uniformity in sentencing decisions, can be achieved in more effective ways that do not run afoul of the Double Jeopardy Clause. One alternative to appellate review of sentences is administrative review for disparity followed by reports back to the trial judge where appropriate, a process adopted in California and run by California's parole board. An administrative process can accomplish review of virtually every case whereas appellate review can never be that sweeping without making appeals of the sentence automatic in every case. In fact, appellate review of sentences automatically excludes review of those cases in which an appeal is not taken, diminishing significantly the data pool available to appellate courts for judging relative uniformity and proportionality.

To assist the Court in evaluating these problems, and to help it consider the impact on state courts of a ruling that government appeals of sentences are constitutional, *Amicus*

has summarized in some detail the structure of California's determinate sentencing system. It is a system that requires a trial judge to make a number of decisions in each case in which he imposes a prison sentence, and each of these decisions can give rise to government dissatisfaction with the sentence. The California example demonstrates how government appeals of sentences would negate a benefit of determinate sentencing by creating uncertainty as to a prisoner's final sentence, thereby causing the precise tension and unrest among prisoners that determinate sentences were designed to eliminate. The California system also illustrates the potential that government appeals of sentences hold for increasing the length and complexity of sentencing hearings and for increasing the workload of the appellate courts.

A. Government Appeal of Sentences Would Thwart Fundamental Policies Underlying the Double Jeopardy Clause.

1. Government Appeal of Sentences Would Subject the Defendant to the Ordeal and Expense of Twice Defending Against the Maximum Sentence.

One of the fundamental purposes of the Double Jeopardy Clause is to protect a criminal defendant, disadvantaged by limits on the resources available to him for resisting the power of the state, from having to twice defend himself against the same charges. A major concern underlying the clause is that multiple prosecutions will unfairly subject the defendant to the "embarassment, expense, and ordeal of a second trial." (See *Swisher v. Brady*, 438 U.S. 204, 216 (1978); *Green v. United States*, 355 U.S. 184 (1957).) While a government appeal of the sentence does not force a defendant through a second complete trial, it does force him for a second time to defend against the spectre of the

maximum punishment—the exact same harsh potentiality which he faced and escaped at the trial level.

The ordeal this appellate review forces on the defendant must be measured in part by the uncertainty it creates. Finality of the trial court's judgment carries psychological benefits for those imprisoned. The outcome of the criminal case has been fully revealed once the sentence is announced. The anxiety over sentence, which for many defendants is the only real concern, is dispelled and the defendant can go about the process of accomodation and resignation which may help him endure his loss of freedom. The certainty of his sentence or its outer limits allows him to predict the immediate course of his life, at least in rough terms.

This predictability is not a trivial concern. In a recent discourse on sentencing, Judge Marvin E. Frankel recognized the relationship between society's general desire for certainty and predictability in the law and the psychological needs of an individual imprisoned for crime:

> "We want to be able to plan our business and family decisions by knowing in advance just how painful the tax will be, what the zoning laws promise, how long an employment contract will endure. It may be imagined that knowing the actual length of a prison term might serve similar, though much more searing needs." (Frankel, *Criminal Sentences: Law Without Order*, pp. 96-97 (1973).)

Judge Frankel's comments were intended as criticism of the psychic toll taken by indeterminate sentences. Others have joined in that criticism recognizing that "the very indeterminancy of indeterminate sentences is a form of psychological torture." (Alschuler, *Sentencing Reform and Prosecutorial Power*, 126 U.Pa.L.Rev. 550, 553 (1978).) Government appeals of sentencing would add a new twist to that torture. For the year or more that it would take to

resolve the government's appeal, not only would the indeterminately sentenced prisoner be in the dark as to the actual period of his incarceration, he would not even know its outer limits. Increased and oppressive anxiety would have to result. The uncertainty caused by sentence appeals would have the same impact on prisoners sentenced under "fixed" or "determinate" sentence systems. Instead of knowing their final punishment after sentencing, at least within a narrow range, they would have to suffer through their first year or two of incarceration with the maximum punishment still hanging over their heads. In summary, it takes little imagination to recognize the significant ordeal for Mr. DiFrancesco in delaying the finality of his 10 year sentence so that the Government may seek the 25 year maximum in a distant and unknown appellate forum.

Defending a sentence on appeal is also expensive, especially where a defendant has just incurred the expenses of a trial. Mounting a defense in a criminal case often means the disruption of the defendant's employment, a breakdown of his family relationships and financial devastation. Having suffered these penalties and lost, and facing the bleak prospect of prison, a government appeal of the sentence would force the defendant to pull together whatever financial resources remain to resist once again the threat of the maximum punishment. Appellate representation by competent criminal specialists does not come cheaply and the expense of a government appeal to the defendant cannot be lightly dismissed.

2. Government Appeal of Sentences Would Deprive the Defendant of His Right to Have His Trial Completed by a Particular Tribunal.

In addition to protecting the defendant from the ordeal and expense of multiple proceedings, the Double Jeopardy

Clause also protects the defendant's "valued right to have his trial completed by a particular tribunal." (*Swisher v. Brady, supra,* 438 U.S. at 215.) Government appeals of sentences would undermine that right by denying finality to the sentencing decision of the judge who has conducted the trial and who presided at the sentencing proceedings. It would interject into the sentencing process an appellate tribunal that is a stranger to the history and development of the case and that has had no opportunity to observe and evaluate the defendant or the trial and sentencing witnesses who have offered testimony relevant to the sentencing decision.

The sentencing judge does not base his decision solely on information conveyed to him during the sentencing hearing and does not rely solely on evidence presented in written reports to the exclusion of live testimony. The testimony elicited during trial can reveal mitigating circumstances which the probation or presentence report completely misses, and the live testimony of a credible psychiatrist, relative or friend at the sentencing hearing can provide greater insight into the defendant's behavior than a cursory written outline of his social background. The point is that the sentence choice results from a dynamic process in which the trial judge plays the central role. To switch that role to a tribunal that has not participated in the process works a substantial unfairness on the defendant.

In the first place, evidence relevant to the sentence is developed and presented with an eye to the individual attitudes and practices of a particular judge. The judge's attitudes encompass both his reactions to the defendant's case in particular, reflected throughout the trial, and his more generalized history of sentencing practices. A competent defense lawyer will be attuned to these attitudes and will gear the presentation of evidence at sentencing, and

even during trial, to those attitudes. As a result, the content of the sentencing presentation will depend on the tribunal charged with the responsibility for sentencing.

Appellate review of sentences at the government's instigation would replace the trial judge with a remote and unknown group of appellate judges as the final arbiters of the defendant's punishment. It would make it extremely dangerous to devise and rely upon a strategy directed specifically at the trial judge. The result is to deprive the defendant of the trial judge's familiarity and proximity to the case and to deny him the benefit of having the sentence finally resolved in the particular tribunal that has heard all the evidence.

The interjection of the appellate tribunal into sentencing also deprives the defendant of the trial court's subjective evaluation of the defendant's character and attitude. This Court has recognized that "For the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (*Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937), quoted with approval in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).) The trial judge's evaluation of character can be greatly influenced by seeing and hearing the defendant during the course of the courtroom proceedings. These observations can provide insights into such matters as the defendant's veracity (see *United States v. Grayson*, 438 U.S. 41 (1978), his willingness to accept responsibility for his conduct, the genuiness of any display of remorse, his attitude toward authority (see *Roberts v. United States*, . . . U.S. . . . (1980)) and toward the processes of the law, etc. An appellate tribunal would not have the personal contact necessary for such an evaluation and it will not be available from the cold pages of the transcripts.

The situation of being forced to rely on a cold transcript before a second tribunal also raises a due process problem deserving some mention. As the dissenters in *Swisher v. Brady* recognized (*Swisher v. Brady, supra*, 438 U.S. at 229-233 (Marshall, J., dissenting)), due process encompasses the principle that hearing and observing live witnesses are important to a reliable factfinding process. Sentencing hearings often include witnesses brought in to contest or supplement written probation and presentence reports, and the judge's evaluation of the credibility of those witnesses will influence the sentence choice. An appeal from the sentence decision will obviously be based solely on the cold record provided by the transcript. As a result, the appellate tribunal will be unable to observe and evaluate the demeanor of favorable witnesses.

The dissent in *Swisher* correctly observed that this artificial limitation on the evidence before the reviewing court denies the defendant due process of law; but the due process violation in the sentencing context is even more prejudicial than in the *Swisher* context. The procedures under scrutiny in *Swisher* at least allowed the accused juvenile to elect a hearing *de novo* before a trial judge when the state filed exceptions to the findings of the master. Where the juvenile deemed it important, demeanor evidence might still play a part in the resolution of the case. On the other hand, the appellate forum which would handle sentence appeals would not take evidence under any circumstances and is unprepared and unequipped to do so. The significance of demeanor evidence relevant to the sentencing decision would be lost on the appellate court and the defendant would be totally foreclosed from presenting it in that forum.

The obvious point here is that sentencing by an appellate tribunal is qualitatively different from sentencing by the trial court. It is significant that all the cases used by the Solicitor

General in his brief to show that courts sometimes have power to resentence a defendant more harshly, involve resentencing by the trial court. (See *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bozza v. United States*, 330 U.S. 160 (1947); *Commonwealth v. Weymouth*, 84 Mass. 144 (1861).) The Government can cite no case which approved harsher resentencing by any appellate tribunal. This fact adds to the "impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court," evidence which convinced the Second Circuit to dismiss the Government's appeal in Mr. DiFrancesco's case. (604 F.2d at 785.)

B. Government Appeals of Sentences Do Not Provide the Only Means or Even the Most Effective Means for Promoting Greater Uniformity in Sentencing.

In the Brief for the United States, the Solicitor General argues that government appeals of sentences should be allowed because they would promote greater uniformity in sentencing and result in a fairer sentencing structure. It is, of course, one thing to say that disparity in sentencing from one judge to another or from one jurisdiction to another is a problem deserving of attention. It is quite another to conclude that the solution lies in appellate review of sentencing or that appellate review should include authorization for the appellate tribunal to increase the sentence imposed by the trial judge. The goal of uniformity can be promoted by methods other than appellate review, and can also be promoted by appellate review which does not include the power to increase the sentence.

Judge Frankel discusses some of the alternatives for promoting uniformity in Criminal Sentences: Law Without Order (1973). Sentencing institutes come in for heavy crit-

icism as too brief, too infrequent and too poorly organized to do much good (pp. 61-66), but some impact on gross disparity and some limited movement toward consensus can surely be anticipated from more intense, more frequent and better organized exchanges among sentencing judges. Another alternative, the sentencing council, involves a process where several judges from the same district confer and share their views on a particular case after reviewing the presentence report. Judge Frankel finds the results encouraging where this process has been used experimentally because the tendency is to level out individual extremes toward leniency and toward severity and to approach a middle ground (pp. 69-74).

Judge Frankel also lists and argues the case for appellate review of sentences as a means to eliminate gross disparities (pp. 75-85). However, he does not address the double jeopardy implications of government appeals in which a harsher sentence is sought. Moreover, his concern that sentences be subject to appellate review is directed toward providing an escape value for the "cruelly excessive" sentence (pp. 81-82, 84) through the development of uniform sentencing principles.

It is revealing that Judge Frankel cites with approval the English practice of allowing a separate appeal against sentence. England allows only the offender to initiate an appeal against the sentence and does not permit the prosecution the same right. (Thomas, David A., *Principles of Sentencing*, pp. 4-5 (1979).) While the Solicitor General would attack this system as unbalanced, it nevertheless is a viable system for promoting uniformity once it is recognized that an appellate ruling upholding a sentence challenged as excessive by the defendant does not stand for the proposition that the sentence was appropriately severe. It only says it was not excessive. Where an English appellate court upholds dis-

similar sentences in similar cases, the most severe sentence it upholds logically provides guidance as to what is proper. In this way, over time, the appellate court can lead trial courts toward uniformly appropriate terms.

Another alternative to appellate review, one that Judge Frankel does not discuss, was adopted in California as part of the 1977 revision of California's sentencing structure (discussed in greater detail, *infra*). The California Legislature clearly stated that uniformity of sentences for similarly situated offenders was the central goal of the new system. (Cal. Pen. Code §1170(a)(1).) To help achieve this goal, the Legislature included an administrative process for identification of disparate sentences. It charged the parole authority (now known as the Board of Prison Terms) with the responsibility of reviewing the sentences of all felons receiving determinate prison terms. The review must include a comparison of each individual sentence with sentences of others convicted of similar crimes. If the sentence is deemed disparate, the Board must recommend that the trial court recall the sentence and resentence the offender. (Cal. Pen. Code §1170(f).) The resentencing is discretionary with the trial judge and subject to the limitation that the new sentence may not be greater than the initial sentence. (Cal. Pen. Code §1170(d).)

Where the Board determines that a sentence is disparately lenient, the recommendation for resentencing serves the goal of promoting uniformity even though the resentence cannot result in a harsher punishment. In this circumstance, the Board's recommendation is essentially advisory. But the trial judge is alerted to the disparity and can make adjustments in his future sentencing practices in response to this information. One virtue of California's administrative disparate review is that it is performed by one centralized agency with access to data on every felon sentenced to state

prison. Appellate review, on the other hand, would be limited to cases from the geographical jurisdiction of the appellate tribunal and would only include those cases in which an appeal is filed. Thus, appellate review would not necessarily address disparities between different jurisdictions or court systems, disparities which may be more significant than those between judges in the same districts. (Silberman, Charles E., *Criminal Violence, Criminal Justice*, pp. 254-255 (1978).) In addition, appellate review would exclude large numbers of cases where neither side appealed, or where they appealed but did not challenge the sentence.

Appellate review of sentences is only one possible route to greater uniformity in sentencing. Even if one assumes it is the best alternative available, it does not follow that appellate review can only be effective in eliminating disparity if the government has the right to instigate appeals of those sentences the prosecution deems too lenient. England, for example, has managed to develop an effective system without a government right to appeal the sentence. (Thomas, *Principles of Sentencing* (1979).) In any event, whatever the benefits that might accrue for the administration of justice through appellate review of sentences at the instigation of the state, they do not justify sacrificing the principles underlying the Double Jeopardy Clause.

C. Government Appeals of Sentences Will Eliminate the Certainty in California's Determinate Sentences and Holds the Potential for Dramatically Increasing California's Appellate Workload.

1. A Summary of the California Determinate Sentencing System.

Effective July 1, 1977, the State of California enacted a "determinate" sentencing system to replace the "indeterminate" system it had utilized for 60 years. The determinate scheme applies to all but the most serious felony

offenses and limits the maximum period of prison incarceration much more sharply than did the indeterminate sentencing law. In place of terms with ranges such as six months to life or three years to life, the new law substitutes terms with ranges such as two, three or four years or two, four or six years. The new law also removes the power for setting the actual period of incarceration from the parole board and places it in the hands of the trial judge. The parole board, known as the Board of Prison Terms, still exists to supervise felons released on parole after serving their fixed terms and to conduct parole consideration hearings for felons convicted of crimes to which an indeterminate sentence still attaches, such as first and second degree murder (with terms of 25 years to life and 15 years to life respectively) and kidnapping for robbery (with a term of straight "life"). (See Cal. Pen. Code §§190, 209, 3041.) However, from the perspective of most convicted felons (all except those sentenced to indeterminate terms for the most serious felonies), the major change accomplished by the new law is that they know how long they will remain incarcerated when they enter prison. They no longer face the uncertainty and vagaries of a discretionary parole system.

It is necessary to describe the determinate sentence system in some detail in order to explain the impact on that system of a generalized government right to appeal sentencing decisions. A determinate sentence starts with a "base term" for the offense for which the defendant faces imprisonment. (See Cal. Rules of Court, rule 405(b).) The base term is selected from among the three possible terms prescribed by statute for virtually all felony offenses. For example, robbery carries a punishment of two, three or five years in prison. (Cal. Pen. Code §213.) The sentencing court must select the middle term punishment unless there are "circumstances in aggravation of mitigation of the crime" jus-

tifying imposition of the upper term or the lower term. (Cal. Pen. Code §1170(b).) The upper term may not be imposed unless circumstances in aggravation are established by a preponderance of the evidence and the sentencing judge determines that aggravating circumstances outweigh mitigating circumstances. Selection of the lower term can only follow a similar preponderance finding and a finding that mitigation outweighs aggravation. (Cal. Rules of Court, rule 439(b).)

For the guidance of trial courts, the California Judicial Council has adopted rules defining circumstances in aggravation and mitigation. (Cal. Pen. Code §1170.3; Cal. Rules of Court, rules 421 & 423.) They include an open ended list of suggested factors relating to such matters as the actual or potential harm to the crime victim (''great violence'' versus ''caution to avoid harm''), the defendant's degree of involvement (leadership versus minor role), the degree of criminal sophistication, the presence of provocation on the part of the victim or other circumstances tending to demonstrate diminished culpability falling short of a legal excuse for the defendant's conduct, and the defendant's mental state and criminal background.

The base term is only the first step in sentencing. The California Legislature deemed certain typical aggravating circumstances surrounding crime sufficiently serious to merit increased punishment on their own rather than simply as reasons for selecting the upper term. Therefore a number of penalty provisions were drafted to add incremental periods of punishment to the base term, known as ''enhancements'', premised on factual findings that the defendant personally used or was armed with a deadly weapon, intentionally inflicted great bodily injury on the victim, caused a property loss of great value, or served time in prison because of prior felony convictions.

More specifically, a defendant faces a two year enhancement to the base term punishment if he personally uses a firearm during the commission of the crime—three years if the crime is one of six enumerated forcible sex crimes. (Cal. Pen. Code §§12022.3(a), 12022.5.) The enhancement for personal use of a deadly or dangerous weapon other than a firearm is generally one year, or three years in the case of enumerated sex crimes. (Cal. Pen. Code §§12022(b), 12022.3(a).) Mere arming with a firearm, as opposed to actual use, can generally add one year to the base term, but adds two years if the crime is an enumerated sex offense. (Cal. Pen. Code §§12022(a), 12022.3(b).) Arming with a deadly weapon other than a firearm cannot result in a specific enhancement for most crimes, but can add two years if the crime is an enumerated sex offense. (Cal. Pen. Code §12022.3(b).)

The other enhancement provisions carry similar increments of punishment. Great bodily injury to the victim may result in a three year enhancement for most crimes, or a five year enhancement for forcible sex crimes. (Cal. Pen. Code §§12022.7, 12022.8.) A felon who takes, damages or destroys property causing a loss in excess of $25,000 faces a one year enhancement, but if the loss exceeds $100,000 the enhancement increases to two years. (Cal. Pen. Code §12022.6.) Although enhancements for a defendant's prior record have become more complex due to recent legislation increasing punishment for forcible sex offenses, in general every "prior separate prison term" (a concept carefully distinguished from a simple prior conviction) can add at least one year to the base term. (Cal. Pen. Code §667.5(b).) If a present offense is a "violent felony" and the prior prison term was imposed for a "violent felony," then the enhancement for each such prior prison term is three years. (Cal. Pen. Code §§667.5(a), (b).) Sentencing for forcible

sex offenses follows these rules for priors unless the priors are also for forcible sex offenses. In that case each prior *conviction* (whether or not a prison term resulted) can add a five year enhancement (Cal. Pen. Code §667.6(a)), and if the defendant has served two or more prior prison terms for forcible sex offenses, each separate prior term can add 10 years to his sentence. (Cal. Pen. Code §667.6(b).)

All the specific enhancement provisions depend on factual findings left to the jury unless the defendant admits the factual premise. However, an adverse factual finding or an admission of an enhancement does not bind the sentencing judge completely. The judge still has the power to strike the additional punishment called for by the enhancement provisions if he determines there are circumstances in mitigation which justify this action. (Cal. Pen. Code §1170.1(g).) The same sort of mitigating factors that might support the selection of the lower term punishment may also support striking the punishment for an enhancement. (Cal. Rules of Court, rule 423.)

In addition to the base term and specific enhancements, the determinate sentencing structure also provides for increases in the prison term where the defendant has suffered multiple convictions and the judge elects to sentence him consecutively. It is not just a matter of adding together the base terms and the enhancements for each crime. While the judge has the discretion to elect this harsher "full term" approach where the multiple convictions are for enumerated forcible sex offenses (Cal. Pen. Code §667.6(c)), normally the judge may only add to the base sentence one-third of the middle term for each consecutive offense plus one-third of any weapon or great bodily injury enhancement when the consecutive offense meets the definition of a "violent felony." (Cal. Pen. Code §1170.1(a); see also §667.5(c).) The judge's discretion to sentence consecutively on multiple

counts includes the power to run a determinate sentence consecutively to an indeterminate sentence. (Cal. Pen. Code §669.) The determinate term must be completed before the defendant begins to serve the indeterminate term. In practical terms, this means a defendant with a 10 year determinate term for several robberies and a consecutive 25 to life term for a first degree murder must serve the 10 years (minus credits of up to one-third for good behavior) before he can even start serving the set minimum of 16 years and 8 months necessary for him to become eligible for parole on the murder sentence. (See Cal. Pen. Code §190.) The judge may also order two indeterminate terms to run consecutively. (Cal. Pen. Code §669.)

2. The Impact in California of a Government Right to Appeal Sentences.

This abbreviated course in California's determinate sentencing structure should demonstrate that California judges have a number of judgment calls and discretionary decisions to make at sentencing when they impose a prison term. The determinate sentence system was designed to make these decisions final so that the felon will know the precise term he faces when he enters prison. Secure in this knowledge, he does not have to agonize over how to satisfy a parole board. The relatively sound theory behind this is that the increased certainty will facilitate a better adjustment to incarceration. A government appeal of the sentence, however, would obviously remove the benefits of certainty and change a final sentence into a tentative sentence pending appeal. Until the appellate process runs its course a year or more down the line, the maximum punishment continues to hang over the offender's head. The Double Jeopardy Clause was designed to prevent the exact type of anxiety and ordeal that a government appeal of sentence creates by forcing the

offender to defend against the maximum punishment for a second time on appeal.

It is, of course, true that the range of punishment under California's determinate sentencing law may be narrower in general than the range of punishment faced by Mr. DiFrancesco in the federal system. As a special offender, DiFrancesco faces the theoretical possibility of having his concurrent 10 year sentences increased by the appellate court to sentences of 25 years. This 15 year differential would be unlikely under present California law. However, the narrower ranges under California law should not be relied upon to minimize the uncertainty caused by appellate review of sentencing at the instigation of the prosecution. In the short period from July 1977 to the present, the California Legislature has twice passed major revisions of the determinate sentencing structure with the purpose of increasing punishment and widening the available range of sentences, especially for violent crimes. A few examples of these changes will illustrate the trend.

The original determinate sentencing law provided for no more than a one year differential between the lower and middle terms or between the middle and upper terms for any given offense. The recent amendments to the law provide for one, two and three year differentials between the lower and middle terms for some offenses (see *e.g.*, Cal. Pen. Code §§213, 220 and 264) and one or two years between the middle and upper terms (see *e.g.*, Cal. Pen. Code §§245(a) & 461). Recent legislation also increases the weapon, great bodily injury and prior record enhancements applicable to enumerated forcible sex offenses as well as increasing the term for consecutive sentences on these offenses. Finally, whereas the original determinate sentencing law provided only for concurrent terms where a felon was convicted of a combination of determinate and indetermi-

nately sentenced crimes, recent changes make it possible to run such sentences consecutively.

From these examples, the trend to increase determinate penalties is readily apparent. Public pressure in that direction is clearly difficult to resist, and California's narrow determinate ranges have started to be displaced by much broader ranges. The potential impact on a California sentence of a government appeal is fast approaching the dramatic impact which Mr. DiFrancesco faces.

In addition to eliminating the certainty in determinate sentences, the creation of a government right to appeal the trial court's sentence could also dramatically increase California's appellate workload. Obviously, any one of the decisions made by a judge at sentencing may dissatisfy the prosecution if it results in a term shorter than the maximum. Potentially, authorization of government appeals could trigger an appeal every time a judge imposes the middle or lower term, strikes the punishment for an enhancement, utilizes the more lenient formula for consecutive sentencing involving multiple sex offenses or elects to sentence the defendant concurrently on multiple counts.

In California, this impact on the appellate caseload would perhaps be more significant than in other jurisdictions because government appeals of determinate sentences would not be limited to sentences following contested trials. Such appeals could also be taken from sentences following plea bargains. Bargaining under determinate sentencing generally takes the form of charge bargaining, where the remaining charges then define a legal maximum for the term; or the bargain involves a commitment that a sentence will not exceed a maximum number of years which is something less than the legal maximum for the charges involved. In either case, the sentencing judge usually retains some discretion to sentence below the maximum, for example by

imposing the middle term rather than the upper term. With a government right to appeal the sentence, the exercise of this remaining discretion would be subject to appellate review if the prosecution was dissatisfied with less than the maximum. Unless the defendant bargained for a precise number of years, no more and no less, he could not avoid the uncertainty, and the state could not avoid the cost, that appellate review would interject.

The determinate sentencing law increased the number of decisions a California judge must make in sentencing a felon to prison. A government right to appeal the judge's sentence choices will open the way for appellate consideration of every lower term and every concurrent sentence, even where the sentence follows a bargained disposition. The major fallout will be to create uncertainty as to the final term of imprisonment for every felon sentenced to state prison, and to further clog California's appellate forums.

Conclusion.

The Double Jeopardy Clause protects citizens from the ordeal and expense of twice defending themselves against the same charges. It also protects the defendant's right to have his trial completed in a particular tribunal. Authorization of government appeals of sentence would force the accused to defend himself against the maximum sentence for a second time on appeal having already done so at the trial level. It would remove the final decision on sentence from the trial judge, with his proximity and familiarity with the case, and place it in the hands of a remote and unknown appellate tribunal. These results would thwart the principles underlying the Double Jeopardy Clause and thereby violate its mandate.

For these reasons, and the other reasons stated in the brief, the judgment of the United States Court of Appeals

for the Second Circuit should be affirmed in its dismissal of the government's appeal of the sentence.

Respectfully submitted,

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